

Office of the Secretary of Defense

§ 310.28

(2) Exempt records that have been incorporated into a nonexempt system of records are still exempt but only to the extent to which the provisions of the Act for which an exemption has been claimed are identified and an exemption claimed for the system of records from which the record is obtained and only when the purposes underlying the exemption for the record are still valid and necessary to protect the contents of the record.

(3) If a record is accidentally misfiled into a system of records, the system notice and rules for the system in which it should actually be filed shall govern.

§ 310.27 Access exemption.

(a) An individual is not entitled to access information that is compiled in reasonable anticipation of a civil action or proceeding.

(b) The term “civil action or proceeding” is intended to include court proceedings, preliminary judicial steps, and quasi-judicial administrative hearings or proceedings (i.e., adversarial proceedings that are subject to rules of evidence).

(c) Any information prepared in anticipation of such actions or proceedings, to include information prepared to advise the DoD Component officials of the possible legal or other consequences of a given course of action, is protected.

(d) The exemption is similar to the attorney work-product privilege except that it applies even when the information is prepared by nonattorneys.

(e) The exemption does not apply to information compiled in anticipation of criminal actions or proceedings.

§ 310.28 General exemption.

(a) *Use of specific exemptions.* A DoD Component is not authorized to claim the exemption for records maintained by the Central Intelligence Agency established by 5 U.S.C. 552a(j)(1) of the Privacy Act.

(b) The general exemption established by 5 U.S.C. 552a(j)(2) of the Privacy Act may be claimed to protect investigative records created and maintained by law-enforcement activities of a DoD Component.

(c) To qualify for the (j)(2) exemption, the system of records must be maintained by a DoD Component, or element thereof, that performs as its principal function any activity pertaining to the enforcement of criminal laws, such as the U.S. Army Criminal Investigation Command, the Naval Investigative Service, the Air Force Office of Special Investigations, and military police activities. However, where DoD offices perform multiple functions, but have an investigative component, such as the DoD Inspector General Defense Criminal Investigative Service or Criminal Law Divisions of Staff Judge Advocates Offices, the exemption may be claimed. Law enforcement includes police efforts to detect, prevent, control, or reduce crime, to apprehend or identify criminals; and the activities of military trial counsel, correction, probation, pardon, or parole authorities.

(d) Information that may be protected under the (j)(2) exemption includes:

(1) Records compiled for the purpose of identifying criminal offenders and alleged offenders consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, parole, and probation status (so-called criminal history records);

(2) Reports and other records compiled during criminal investigations, including supporting documentation.

(3) Other records compiled at any stage of the criminal law enforcement process from arrest or indictment through the final release from parole supervision, such as pre-sentence and parole reports.

(e) The (j)(2) exemption does not apply to:

(1) Investigative records prepared or maintained by activities without primary law-enforcement missions. It may not be claimed by any activity that does not have law enforcement as its principal function except as indicated in paragraph (c) of this section.

(2) Investigative records compiled by any activity concerning employee suitability, eligibility, qualification, or for individual access to classified material

regardless of the principal mission of the compiling DoD Component.

§ 310.29 Specific exemptions.

(a) *Use of specific exemptions.* The specific exemption established by 5 U.S.C. 552a(k) of the Privacy Act may be claimed to protect records that meet the following criteria (parenthetical references are to the appropriate subsection of the Act:

(1) *(k)(1).* Information subject to 5 U.S.C. 552(b)(1), (DoD 5200.1-R) (see also paragraph (c) of this section).

(2) *(k)(2).* Investigatory information compiled for law-enforcement purposes, other than information that is covered by the general exemption (see § 310.28). If an individual is denied any right, privilege or benefit he or she is otherwise entitled by Federal law or for which he or she would otherwise be eligible as a result of the maintenance of the information, the individual shall be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source. This exemption provides limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(i) The information must be compiled for some investigative law enforcement purpose, such as a criminal investigation by a DoD office, whose principal function is not law enforcement, or a civil investigation.

(ii) The exemption does not apply to investigations conducted solely for the purpose of a routine background investigation (see paragraph (a)(5) of this section), but will apply if the investigation is for the purpose of investigating DoD personnel who are suspected of violating statutory or regulatory authority.

(iii) The exemption can continue to be claimed even after the investigation has concluded and there is no future likelihood of further enforcement proceedings.

(3) *(k)(3).* Records maintained in connection with providing protective services to the President and other individuals under 18 U.S.C. 3056, “Powers, Authorities, and Duties of United States Secret Service.”

(4) *(k)(4).* Records maintained solely for statistical research or program evaluation purposes and that are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records that may be disclosed under 13 U.S.C. 6, “Information for other Federal Departments and Agencies.

(5) *(k)(5).* Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent such material would reveal the identity of a confidential source.

(i) This exemption permits protection of confidential sources used in background investigations, employment inquiries, and similar inquiries that are for personnel screening to determine suitability, eligibility, or qualifications.

(ii) This exemption is applicable not only to investigations conducted prior to the hiring of an employee, but it also applies to investigations conducted to determine continued employment suitability or eligibility.

(6) *(k)(6).* Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal or military service, if the disclosure would compromise the objectivity or fairness of the test or examination process.

(7) *(k)(7).* Evaluation material used to determine potential for promotion in the Military Services, but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(b) *Promises of confidentiality.* (1) Only the identity of sources that have been given an express promise of confidentiality may be protected from disclosure under paragraphs (a)(1), (5), and (7) of this section. However, the identity of sources who were given implied promises of confidentiality in inquiries conducted before September 27, 1975, also may be protected from disclosure.

(2) Ensure promises of confidentiality are not automatically given but are used sparingly. Establish appropriate procedures and identify fully categories of individuals who may make